Shamin carried out the assessment, in his own words, 'to the best of my ability'. He had no idea as to the valuation of the goods and materials used by the contractor. He had no idea as to the quantity of work done with regard to the reinforced concrete. In fact he did the valuation purely on visual assessment. In the event I do not think the valuation report as put up by Shamin can be relied upon. I would therefore disregard this report and accept the valuation put up by the Architect."

With the greatest respect to the argument put forward by counsel for the appellant, we are firmly of the view that there is no merit whatever in the argument and we are satisfied that the learned judge had rightly arrived at the decision that he did.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Ong Ban Chai & Razak; Foo & Woon.*

VASUDEVAN v. T. DAMODARAN & ANOR.

[F.C. (Raja Azlan Shah C.J., Wan Suleiman F.J. & Abdoolcader J.) April 21 & May 30, 1981]

[Penang — Federal Court Civil Appeal No 262 of 1980]

Practice and procedure — Application to have action dismissed for want of prosecution — Inordinate delay — No credible excuse — Exercise of discretion by trial judge in dismissing the action — Appeal Court will not interfere.

In this case the second respondent with the support of the first respondent applied by summons for the action to be dismissed for want of prosecution. The appellant's writ in this case had been issued some ten years after the initial accrual of the cause of action. Seven years after the institution of the suit no notice of trial had been given, no summons for directions issued, no discovery made and no steps whatsoever taken to set the action down for trial. The learned trial judge made an order dismissing the action and the appellant appealed.

Held: (1) the delay in this case was inordinate and inexcusable and there were substantial grounds for holding that the respondents had established the matter of a substantial risk of a fair trial not being possible after this long lapse of time and of serious prejudice as a result of the inordinate and inexcusable delay on the part of the appellant;

(2) the learned judge was wholly correct in the exercise of his discretion in the matter and there was no reason to interfere with his decision.

Cases referred to:-

(1) *Birkett* v. *James* [1978] A.C. 297, 317, 326.

(2) *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, 245, 268.

(3) *Bremer Vulkan Schiffban Und Maschinen-fabrick* v. *South India Shipping Corporation* [1981] 1 All E.R. 289; 2 W.L.R. 141.

(4) *Biss* v. *Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 W.L.R. 382, 389.

(5) *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130, 148.

(6) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

(7) *Evans* v. *Bartlam* [1937] A.C. 473.

(8) *Ward* v. *James* [1966] 1 Q.B. 273.

(9) *Re Reed (a debtor)* [1979] 2 All E.R. 22, 25.

(10) *Damodaran* v. *Vasudevan* [1975] 2 M.L.J. 231.

(11) *T. Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267; [1980] A.C. 497.

(12) *Pryer* v. *Smith* [1977] 1 All E.R. 218.

(13) *Eaton* v. *Storer* (1882) 22 Ch. D. 91, 92.

FEDERAL COURT CIVIL APPEAL.

Subash Chandran for the appellant.

Wong Chong Wah for the 1st respondent.

T. Rajamoorthy for the 2nd respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court):

THE ISSUE

No notice of trial has been given, no summons for directions issued, no discovery made and no steps whatsoever taken to set the action down for trial and proceed to a conclusive determination of the proceedings — all this coming on to 7 years after the institution of the suit which itself was some 10 years after the initial accrual of the cause of action on which the appellant's writ was founded, an aggregate of well-nigh 17 years. In the event the 2nd respondent with the ardent support of the 1st respondent applied by summons on May 5, 1980 for the action to be dismissed for want of prosecution and B.T.H. Lee J. acceded thereto and made an order accordingly on October 18, 1980.

The question for determination in this appeal is whether in the circumstances of this case in the light of the relevant principles of law there are any grounds for us to interfere with the exercise of his discretion by the learned judge in making the order that he did.

THE LAW

It would perhaps be more convenient and appropriate in this case to transpose the normal sequence and deal with the principles of law arising for consideration and application to the facts of the matter before adverting to the history and factual background of these proceedings. The principles involved pertain to the dismissal of an action for want of prosecution and the circumstances in which an appellate court will interfere with the discretion of a court of first instance.

(a) *Dismissal of action for want of prosecution*

The House of Lords in *Birkett* v. *James*,[1] approving the decision of the English Court of Appeal in a trilogy of appeals reported *sub nomine Allen* v. *Sir Alfred McAlpine & Sons Ltd.*,[2] held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed *per curiam* that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules

of court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action. The House of Lords in *Bremer Vulkan Schiffbau Und Maschinenfabrik* v. *South India Shipping Corporation*[3] again restated and discussed these principles but held they do not apply to arbitration proceedings.

We would specifically refer to the propositions enunciated by Salmon L.J., in *Allen*[2] (at page 268) to the effect *inter alia* in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. The decision of the English Court of Appeal in *Biss* v. *Lambeth, Southwark and Lewisham Area Health Authority (Teaching)*[4] (distinguishing *Birkett*[1] on a point under the English Limitation Acts, 1939 to 1975 not material for the purposes of the present appeal) is to the effect that in determining whether the delay after the writ had been issued is substantial, the court has to consider whether the delay has prejudiced both a fair trial and the defendants, and in considering the prejudice to the defendants, the delay after the issue of the writ has to be considered against the delay before issue, and whether such delay has substantially prejudiced the defendants. We would draw particular attention to the judgment of Lord Denning M.R., stating (at page 389) that prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

(b) *Review of discretion by an appellate court*

There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co.* v. *Johnston*[5] at page 148 *per* Lord Wright). The Privy Council held in *Ratnam* v. *Cumarasamy & Anor.*[6] that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans* v. *Bartlam.*[7]

The House of Lords, approving the decision of the English Court of Appeal in *Ward* v. *James,*[8] held to the same effect in *Birkett*[1] (at pages 317, 326). For good measure, we would refer to the felicitous expression of Goulding J., in *Re Reed (a debtor)*[9] on this point (at page 25):

> "... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at."

THE HISTORY AND FACTS

The writ in this matter was taken out by the appellant against the 1st respondent on December 19, 1973, claiming entitlement, as legal owner, to a half undivided share in five lots of land situate in Kedah allegedly held on trust for him by the 1st respondent and certain consequential orders thereto and in the alternative damages and indemnity for breach of trust. The statement of claim was filed on March 20, 1974 from which it appears that the appellant's claim is founded on an oral agreement alleged to have been made in or about January 1964 between the appellant, the 1st respondent and certain other persons and on an acknowledgment in writing by the 1st respondent made on November 23, 1971. An amended statement of claim was re-delivered on December 7, 1974. Further and better particulars of the statement of claim had been sought by the 1st respondent on April 25, 1974 and these were delivered on December 29, 1974. The 1st respondent delivered his defence on January 22, 1975 *inter alia* denying the claim and the contents of the acknowledgment of November 23, 1971 which he alleges was written by the appellant at whose request he signed it. The appellant filed a reply thereto on January 29, 1975.

The 2nd respondent was joined as a defendant in the proceedings under an order of court made on July 31, 1975 and pursuant to this order the appellant filed an amended writ and a further amended statement of claim on August 9, 1975, now claiming the primary and substantive relief sought against the 2nd respondent as trustee for him of the half undivided share in the land in question and in the alternative damages and indemnity for breach of trust. The 2nd respondent filed its defence and a counterclaim on September 30, 1975, the counterclaim being for general and special damages and loss of interest on a sum paid for the purchase of the land as a result of a *lis pendens* order registered at the instance of the appellant, and then, to rectify incorrect references therein to the parties, filed an amended defence and counterclaim on November 18, 1975. As a result of a request by the appellant on March 16, 1976 further and better particulars of its amended defence were delivered by the 2nd respondent on May 16, 1976. The appellant filed a reply and defence to the 2nd respondent's amended defence and counterclaim on June 5, 1976. There then ensued a lapse of some 3 years and 3 months until the appellant on September 11, 1979 gave a month's notice under the rules of court

of his intention to proceed in the action but apparently did nothing to further the intention evinced in the notice.

That is as far as things went in the matter. No notice of trial has since or yet been given as required by the rules of court, no summons for directions issued and no steps taken at all to set the action down for trial and proceed to a disposal of the proceedings, and so on May 5, 1980 the 2nd respondent took out a summons for the dismissal of the action for want of prosecution and in a reserved judgment an order to that effect was made by the learned judge on October 18, 1980. In his reserved judgment the learned judge quite properly dismissed the 2nd respondent's counterclaim as well but by some oversight the formal order taken out does not incorporate this. We should perhaps add that it was only after the 2nd respondent's application for the dismissal of the action had been heard on July 6, 1980 and judgment reserved that the appellant made discovery of his documents on July 15, 1980 and issued a formal notice under the provisions of Order 24 rule 2 of the Rules of the High Court, 1980 to the respondents on July 18, 1980 requiring discovery.

As we have said earlier the appellant's cause of action founded on the alleged oral agreement of January 1964 accrued some 10 years before the writ was taken out in December 1973. The pleadings were deemed to be closed under the provisions of Order 27 rule 13 of the Rules of the Supreme Court, 1957 in February 1975 with regard to the 1st respondent and in relation to the 2nd respondent in June 1976 since when the action has remained dormant and stagnant. The delay since the issue of the writ has been almost 7 years, resulting in a total delay of about 17 years which would certainly *ex facie* appear to be inordinate in every sense of the word in the absence of any credible excuse, and the delay has moreover extended beyond the end of the limitation period for the cause of action which is not disputed.

APPLICATION OF THE LAW TO THE FACTS AND CIRCUMSTANCES OF THE CASE

Mr. Subash Chandran for the appellant complains that the application for the dismissal of the action is by the 2nd respondent who only became a party to the proceedings by order of court on July 31, 1975 and that the crux of the case depends on issues between the appellant and the 1st respondent. Even so the delay since that date and the ultimate close of pleadings in June 1976 has been long enough but in any event the 1st respondent strongly supports the application and has filed an affidavit to that effect. We reiterate our earlier reference to what Salmon L.J., said in *Allen*[2] with regard to the prejudice being not only between defendants and the plaintiff but also between each other or between them and third parties, and the defence and counterclaim of the 2nd respondent in this matter lucidly brings out the importance of this in relation to its allegation in the alternative of fraud and negligence against the 1st respondent as well. After its joinder as a co-defendant, the appellant now seeks in his further amended statement of claim his primary and substantive relief against the 2nd respondent which would therefore be equally prejudiced in the circumstances and it would also be materially affected by any serious prejudice to the 1st respondent as well. We therefore see no substance in this complaint.

The pre-writ and post-writ delay and the aggregate thereof cannot but appear to be inordinate and it is therefore necessary now to consider whether it is offset by any credible excuse. The appellant in his affidavit gives as an excuse the fact that it took him some time to trace what he refers to as vital documents pertaining to this action and which back up his case and refers to and exhibits copies of two agreements which he says he obtained only after strenuous efforts on his part and without which he cannot set down the case for hearing. Neither the appellant in his affidavit nor counsel on his behalf before the learned judge and before us would or indeed could say in what way these two agreements are material or relevant to his case to the extent that notice of trial could not be given and the other necessary procedural preliminaries proceeded with or that the trial could not go on without them. Counsel for both respondents informed the learned judge that these two documents are not disputed and, in any event, quite apart from the fact that on a perusal they hardly seem to have any significant relevance for the purposes of the trial of these proceedings and that they are not in issue, it was at all times open to the appellant to apply for discovery or administer interrogatories or take other steps under the rules of procedure for their production and admission. The appellant does not say how long it took him to find these documents, what strenuous efforts he made over what period of time and where and how he obtained them and whether they are disputed, and we therefore find the excuse given in reliance on these two documents as anything but credible. It would appear to us that the real reason for the delay on the part of the appellant in taking the necessary steps to proceed with and in the action lies in the admission by Mr. Subash Chandran before the learned judge that the appellant's solicitors 'were in difficulty in obtaining instructions' from him.

Mr. Subash Chandran also raises before us, although this point is not taken by the appellant in his affidavit nor by Mr. Subash Chandran appearing for him before the learned judge, the matter of two other proceedings relating to the land in question and says that the appellant was awaiting the disposal of an appeal to the Privy Council in the second one. The first proceedings he refers to relate to the removal of a *lis pendens* order registered against the land in question by the appellant pending the determination of this action which this court in a judgment delivered on July 12, 1975 held was valid (*Damodaran* v. *Vasudevan*[10]). In that matter the 1st respondent applied to remove the *lis pendens* order merely to enable him to give the 2nd respondent as purchaser a clear title. It was a subsidiary application and does not affect the question of the present action going to trial and, in any event, those proceedings were disposed of in July 1975. The second proceedings relate to the enforcement by the 1st respondent of an undertaking by a solicitor regarding the payment of the balance purchase money for the land in question deposited

with him and went up on appeal to the Privy Council which gave judgment therein on June 11, 1979 (*T. Damodaran* v. *Choe Kuan Him*[11]) and held that the solicitor was liable to the 1st respondent on the undertaking given and also that the *lis pendens* order had no effect under the National Land Code, 1965 to prevent the transfer of the land. All this had nothing whatsoever to do with the appellant or his action. Mr. Subash Chandran submits that the appellant was waiting for the disposal of the Privy Council appeal but had perforce virtually in the same breath to agree in answer to us that the appellant could have proceeded with his action without waiting for the Privy Council decision, conceding that the subject of the appeal to the Privy Council had no relevance to the present proceedings. In any event, the Privy Council gave its decision in June 1979 and even assuming for a moment it had any relevance or bearing on the present action, and it certainly had none, apart from giving on September 11, 1979 a month's notice of his intention to proceed in the action the appellant has done nothing to pursue the suit he instituted. Again, therefore, the point taken affords no credible excuse of any sort.

Turning now to the question of the delay giving rise to a substantial risk that a fair trial would not be possible or is such as is likely to cause or to have caused serious prejudice to the respondents: Both respondents claim that in the circumstances there is such a substantial risk and serious prejudice to them and we repeat that the prejudice is not only as between themselves and the appellant but also between each other or between themselves and third parties, and we have referred to the pleadings in this respect. The further and better particulars in respect of paragraphs 1 to 4 of the statement of claim furnished to the 1st respondent all relate to events in 1964 pertaining to the oral agreement allegedly entered into, consents and the nomination of a nominee and refer to persons named and present some 17 years ago. There is no certainty whether these persons referred to are still alive and if they are how sound their recollection of the events would be. On these counts both respondents would certainly be seriously prejudiced and as we have indicated the 2nd respondent against whom the substantive relief is now being sought is also equally affected by any serious prejudice to the 1st respondent. The 2nd respondent also avers that documentary evidence and accounts would not be kept for more than 6 years and further that as a housing developer it has not been able because of this action to develop the land which it had purchased solely for that purpose. We accordingly find there are substantial grounds for holding that the respondents have established the matter of a substantial risk of a fair trial not being possible after this long lapse of time and of serious prejudice as a result of the inordinate and inexcusable delay on the part of the appellant.

Mr. Subash Chandran, however, urges us that this is a proper case to make a conditional order dismissing the action in the event of breach of time limits to be prescribed by an order for taking further steps in the action, sometimes referred to as an 'unless' order, citing *Pryer* v. *Smith*.[12] The short answer to that in relation to the circumstances of the matter before us is the judgment of Lord Denning M.R., in *Allen*[2] (at page 245):

> "It was argued before us that the court should never, on the first application, dismiss the action. Even if there was long delay, the court should always give the dilatory solicitor one more chance. The order should be that the action should be dismissed 'unless' he takes the next step within a stated time. Such has been the practice, it was said, for a great many years. It was confirmed by Sir George Jessel M.R., in *Eaton* v. *Storer*[13] and it should not be changed without prior notice. I cannot accept this suggestion. If there were such a practice, there would be no sanction whatever against delay. The plaintiff's solicitor could put a case on one side as long as he pleased without fear of the consequences.
>
> If you read *Eaton* v. *Storer*[13] carefully, it will be seen that the practice described by Sir George Jessel applies only to moderate delays of two or three months. It does not apply when 'there is some special circumstance such as excessive delay'. The principle on which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straightaway, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

We see no justification whatsoever in the light of the several matters we have discussed and against the background of this action to foment, energize, countenance or condone a supine stance such as that taken by the appellant in these proceedings.

THE RESULT

Applying the principles of law we have adumbrated to the history and facts of this action, we are of the considered and firm view that the learned judge was wholly correct in the exercise of his discretion in this matter and we find no reason to interfere with his decision.

The counterclaim of the 2nd respondent was also quite properly dismissed and counsel for the 2nd respondent conceded before the learned judge that if the application to dismiss the action is granted then both the claim and counterclaim must be dismissed. The learned judge decided accordingly in his reserved judgment but the formal order taken out omits to reflect his decision in this respect, and we accordingly direct that the formal order be varied to include the dismissal of the 2nd respondent's counterclaim as well.

Subject to this variation, we dismiss this appeal with costs and order the deposit lodged in court by way of security to be paid out to the respondents equally to account of their taxed costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Skrine & Co.; Jayadeva & Kamal.*